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Attorneys for Defendant and Counter-Claimant
FITBIT, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FITBUG LIMITED, a United Kingdom Limited
Liability Company,

Plaintiff,

v.

FITBIT, INC., a Delaware Corporation,

Defendant.

Case No. 13-cv-01418-SC

**DEFENDANT FITBIT, INC.'S
OBJECTION TO PLAINTIFF'S NEW
REPLY EVIDENCE AND, IN THE
ALTERNATIVE, ADMINISTRATIVE
MOTION FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

Date: December 12, 2014
Time: 10:00 am
Judge: The Honorable Samuel Conti
Courtroom: 1, 17th Floor

FITBIT, INC., a Delaware Corporation,

Counter-Claimant,

v.

FITBUG LIMITED, a United Kingdom Limited
Liability Company,

Counter-Defendant.

1 Pursuant to Local Rule 7-3(d), Defendant Fitbit, Inc. objects to new evidence that Plaintiff
2 Fitbug Limited has submitted with its reply in support of its motion for summary judgment (Dkt.
3 Nos. 74–78). Pursuant to Local Rule 7-11, Fitbit requests leave to file a Supplemental Brief
4 responding to that new evidence. A copy of Fitbit’s proposed Supplemental Brief and the
5 supporting declaration of Ciara N. Mittan are attached hereto as Exhibits 1 and 2 to the Declaration
6 of Jedediah Wakefield in Support of Administrative Motion (“Wakefield Decl.”). Pursuant to
7 Local Rule 7-11(a), Fitbit sought a stipulation from Plaintiff’s counsel regarding the filing of this
8 supplemental brief, but Plaintiff’s counsel declined to stipulate. *See* Wakefield Decl. ¶ 2.

9 “Where new evidence is presented in a reply to a motion for summary judgment, the
10 district court should not consider the new evidence without giving the [non-] movant an
11 opportunity to respond.” *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (internal citation
12 omitted) (district court erred in refusing to grant non-moving party opportunity to respond to new
13 evidence presented in summary judgment reply); *see also Zamani v. Carnes*, 491 F.3d 990, 996
14 (9th Cir. 2007) (district court need not consider new arguments raised on reply); *Dytch v. Yoon*,
15 2011 WL 839421 (N.D. Cal. Mar. 7, 2011) (improper for moving party to introduce new facts or
16 different legal arguments in the reply brief than those presented in the moving papers, and
17 granting nonmoving party’s motion to strike). Here, Plaintiff attempts to introduce new
18 assertions and a new declaration purporting to analyze plaintiff’s alleged “actual confusion”
19 evidence. In particular, the declaration of Catherine M. Ferrara (Dkt. 78) purports to provide a
20 quantitative and qualitative analysis of Plaintiff’s supposed “confusion” evidence. This
21 declaration and the arguments citing it are untimely, and inappropriate in a reply brief.
22 Accordingly, Fitbit objects to this new evidence, and in the alternative seeks leave to submit its
23 proposed supplemental response addressing the deficiencies in Plaintiff’s new evidence.

24 Additionally, Plaintiff also asserts in its Reply—again, for the first time in connection
25 with the pending motions—that the conduct supporting Fitbit’s unclean hands defense ended
26 before the lawsuit. Defendant objects to this new assertion, and alternatively seeks to respond
27 and submit contrary evidence showing the continuing nature of that conduct.

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1 Under Local Rule 7-3(d), Fitbit objects to Plaintiff's new evidence and requests the Court
2 to disregard it. Alternatively, should the Court choose to consider the new evidence, Fitbit
3 requests leave to file the attached supplemental brief and supporting declaration to respond to the
4 Plaintiff's new evidence.

5 Dated: December 8, 2014

FENWICK & WEST LLP

6 By: /s/ Jedediah Wakefield

7 Andrew P. Bridges

8 Jedediah Wakefield

9 Sean S. Wikner

10 Attorneys for Defendant and Counter-Claimant
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